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Nos. 91-680 and 91-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FAIRWAY SPRING CO., INC., THEODORE PETERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

v.

SOVRAN BANK/MARYLAND,

Respondent.

CHEMUNG CANAL TRUST COMPANY, as Trustee of the Fairway Spring Company, Inc. Restated Pension Plan,

Petitioner,

v.

SOVRAN BANK/MARYLAND,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

May the courts develop a federal common law of contribution among fiduciaries under the Employee Retirement Income Security Act of 1974 ("ERISA") in accordance with Congress's instruction, as acknowledged by the Court, to develop federal common law under ERISA based on trust law?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Recognizing the authority granted by Congress to the federal courts under ERISA to develop a federal common law of ERISA based on the common law of trusts, the court of appeals reversed the dismissal of Sovran Bank/Maryland's[1] ("Sovran") federal common law counter-

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[1] C&S/Sovran Corporation is Sovran's parent. Sovran has no non wholly-owned subsidiaries.

claim and third party claims for contribution and indemnity against other fiduciaries of the Fairway Spring Company, Inc. Restated Retirement Income Plan ("Plan"). Appendix ("A.") 27-41. Those other fiduciaries seek a writ of certiorari from this Court.

Fairway Spring Company, Inc. ("Fairway") established the Plan in 1981 to provide retirement benefits for its employees. A. 29. Under the terms of the Plan, Fairway has the authority to appoint a trustee of the Plan. *Id.* Acting through its officers, petitioners Theodore Peterson, Donald R. Peterson, and Dorothy Tarby, Fairway appointed Glen Dawson as the Plan's trustee. A. 29-30.

While trustee of the Plan, Dawson made imprudent investments for the Plan and engaged in transactions prohibited under ERISA's fiduciary standards. A. 30. For example, Dawson invested in various interest bearing notes that purportedly were secured by real property. Dawson failed to investigate the validity of the notes, the creditworthiness of the obligors, or the validity of the security interests supporting the notes. Further, he failed to obtain proper documentation of the Plan's investments in these notes and failed to perfect security interests in the collateral. He also generally failed to diversify the Plan's investments. Joint Appendix to Appellate Briefs ("J.A.") 10-12. Dawson's breaches of fiduciary duty allegedly caused the Plan ultimately to lose more than $1.6 million. J.A. 23.

Fairway and its officers, as the fiduciaries who appointed Dawson, also had the duty to monitor Dawson's performance. A. 30-31. Thus, they knew or should have known of Dawson's breaches. *Id.* However, without acknowledging or taking action to remedy Dawson's fiduciary breaches, Fairway removed Dawson as trustee of the Plan effective December 31, 1984. A. 30. After Dawson's removal as trustee, Lynn Keyser, counsel to Fairway, exercised authority over the Plan and its assets. *Id.* Then, effective February 1, 1985, Fairway appointed

Sovran trustee of the Plan, again without acknowledging any irregularities in Dawson's performance. *Id.*

Some of the imprudent investments that Dawson made for the Plan performed adequately for a time after Sovran's appointment as trustee. *Id.* Eventually, however, payments owed to the Plan under some of these investments ceased.[2] *Id.* In 1989, due to the losses caused by these investments, Fairway removed Sovran as trustee and appointed Chemung trustee of the Plan. *Id.*

As trustee of the Plan, Chemung filed an action against Sovran to recover the losses suffered by the Plan under Dawson's investments and two additional investments allegedly made by Sovran. *Id.* Chemung did not name Fairway or its officers as defendants, despite their failure to monitor Dawson, to correct his breaches, or to disclose his breaches to Sovran. J.A. 1-25. Instead, Chemung sought to collect only from Sovran the amounts lost by the Plan on Dawson's bad investments, notwithstanding the fact that Sovran, unlike Fairway and its officers, had neither the duty nor the opportunity as Dawson's successor to monitor or prevent his investments. *Id.* Under Chemung's theory, regardless of who was responsible for Dawson's fiduciary breaches, or the degree of culpability, Sovran and Sovran alone was required to bear all of the loss resulting from those breaches.

Sovran disagreed, filing a counterclaim against Chemung and a third party action against Fairway, three of

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[2] In 1986, the Department of Labor commenced an action against Dawson to recover losses incurred by 46 pension plans, including the Fairway Plan, caused by Dawson's breaches of fiduciary duty in connection with certain mortgage investments he made for the plans. *McLaughlin v. Dawson*, No. JFM 86-2536 (D. Md.). Thereafter, Dawson filed for bankruptcy. *In re Dawson*, No. 87-5-1372 (Bankr. D. Md.). The Plan received approximately $4,000 as its pro-rata share of the $70,000 the Department of Labor received in settlement of its action. Consent Order, *McLaughlin v. Dawson*, No. JFM 86-2536 (D. Md. Nov. 9, 1988). Under the Consent Order, Dawson was permanently enjoined from acting as a plan fiduciary. *Id.*

its officers, and Fairway's attorney for breach of their fiduciary duties to the Plan under ERISA, alleging, *inter alia*, that they had failed to monitor the activities of Sovran's predecessor, failed to correct his fiduciary breaches, and failed to disclose them to Sovran. A. 30-31.

The district court dismissed Sovran's counterclaim and third party complaint, holding that ERISA does not explicitly provide for contribution among fiduciaries and declining to recognize such a remedy under federal common law. A. 31. The United States Court of Appeals for the Second Circuit reversed. A. 27-41. Consistent with three decisions of this Court and decisions in eight other circuits, the court of appeals recognized that Congress explicitly instructed courts to develop federal common law under ERISA based on trust law and that contribution has been a part of trust law for more than a century.

SUMMARY OF ARGUMENT

The decision of the court of appeals recognizing a right of contribution among fiduciaries is consistent with this Court's recognition of the authority granted to federal courts to develop federal common law under ERISA based on trust law. No conflict arises as a result of the Second Circuit's decision because no court of appeals that has refused to recognize contribution applied the "federal common law" analysis used by the Second Circuit. Specifically, the Ninth Circuit, which has rejected contribution among ERISA fiduciaries, applied the *Cort v. Ash* test and determined there is no implied right of contribution under ERISA. The Second Circuit is in complete accord with that finding.

Finally, recognizing a right of contribution is fully in keeping with the purpose and goals of ERISA and will not undercut the legislative scheme embodied in ERISA. Accordingly, recognition of contribution among fiduciaries under federal common law raises no issue that requires the Court's intervention.

REASONS FOR DENYING THE WRIT

I. A FEDERAL COMMON LAW RULE OF CONTRIBUTION AMONG ERISA FIDUCIARIES IS CONSISTENT WITH THE PURPOSE OF THE STATUTE AND THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS RECOGNIZING THAT THE COURTS ARE TO DEVELOP A "FEDERAL COMMON LAW OF RIGHTS AND OBLIGATIONS UNDER ERISA-REGULATED PLANS."

The court of appeals based its decision to recognize a right of contribution among ERISA fiduciaries on well-settled principles of law. Nothing in the decision, and nothing in its result, warrants review by this Court.

The court of appeals' analysis of the issue is straightforward. Consistent with three decisions of this Court, its own precedent, and decisions of eight other circuits, the court of appeals began by recognizing that the courts are obliged to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). Proceeding from this premise, the court of appeals, again consistent with extensive precedent confirming that ERISA is grounded in the law of private trusts, turned to traditional trust law for guidance in deciding whether to incorporate a right of contribution into the common law of ERISA. The court of appeals readily discerned that from the earliest days of the English chancery courts, and continuing today in the modern American law of private trusts, the equity courts have uniformly recognized that trust fiduciaries are entitled to seek contribution from their cofiduciaries who have jointly caused the trust to suffer a loss. The court of appeals therefore concluded that it is entirely consistent with the statutory design to permit an ERISA fiduciary accused of a breach of duty to seek contribution from other plan fiduciaries whose conduct contributed to the plan's loss.

The petitioners contend that the court of appeals misunderstood the Court's repeated observations in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Pilot Life Ins. Co.*, and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) that "the courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone Tire and Rubber Company*, 489 U.S. at 110 (quoting *Pilot Life Ins. Co.*, 481 U.S. at 56).[3] According to the petitioners, this statement means nothing more than that the federal courts are to apply the traditional common law tools of analysis to determine the meaning of the statute. It does not mean, the petitioners assert, that the federal courts are authorized in ERISA cases to act as traditional common law courts and fashion rules of law needed to resolve issues that the legislature has not addressed. Therefore, they conclude, the court of appeals exceeded its authority as a court of limited jurisdiction by adopting a rule not specifically delineated in ERISA. Petition ("Pet.") at 10-12, 24-25.

This argument ignores the premises of this Court's statements in *Firestone Tire and Rubber*, *Pilot Life*, and *Franchise Tax Board*.

It is, of course, elementary that the federal courts are courts of limited jurisdiction. As such, they ordinarily may do no more than apply federal law as enacted by Congress. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981); *see United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). In some instances, however, this Court has concluded that in en-

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[3] In *Franchise Tax Board*, the Court observed that "* * * ERISA's legislative history indicates that, in light of the Act's virtually unique preemption provision, see § 514, 29 USC § 1144, 'a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.' 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits)." 463 U.S. at 24 n.26.

acting a particular statute, Congress intended to confer on the federal courts the power to develop a body of federal common law consistent with federal policy expressed in the statutory scheme. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); *Wheeldin v. Wheeler*, 373 U.S. 647, 651-52 (1963). For example, this Court long ago decided that in granting to the federal courts exclusive power to adjudicate disputes over breaches of collective bargaining agreements under section 301(a) of the Labor-Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 185(a), Congress intended that "* * * the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. at 96 n.35 ("In *Textile Workers v. Lincoln Mills*, * * * we concluded that § 301(a) supplied a basis for federal jurisdiction over certain cases and an authorization for judicial development of substantive federal law to govern those cases.").

It is against this background that this Court examined the role of the federal courts in adjudicating disputes arising under ERISA. In *Pilot Life*, a case involving the availability of state common law causes of action against an ERISA plan, the Court reviewed ERISA's legislative history and noted that the Conference Report on ERISA made clear in discussing the civil enforcement provisions of the statute that, "'[a]ll such actions . . . are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.'" *Pilot Life*, 481 U.S. at 55 (quoting H.R. Conf. Rep. No. 1280, p. 327 93d Cong., 2d Sess. (1974) (Court's emphasis deleted). Similarly, the Court noted that the principal majority and minority sponsors of the legislation made floor statements confirming that actions arising under ERISA "'will be

regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act' " and that " '[i]t is intended that a body of Federal substantive law will be developed by the courts to deal with rights and obligations under private welfare and pension plans.' " *Id.* at 56 (citations omitted). From this, the Court concluded that there was a clear expectation "* * * that a federal common law of rights and obligations under ERISA-regulated plans would develop * * *" *Id.*

As this Court's decisions recognize, the role of the federal courts in ERISA cases is not limited to statutory interpretation, as the petitioners contend. To the contrary, Congress plainly intended the courts to function in this arena in the same way that they have done for over 30 years under the LMRA—to develop federal common law "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Textile Workers Union*, 353 U.S. at 457.[4]

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[4] Consistent with this directive, the courts of appeals have repeatedly recognized their obligation to formulate rules of decision under federal common law to resolve issues for which ERISA contains no explicit statutory rule. *E.g., Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989) ("Congress specifically contemplated that federal courts, in the interests of justice, would engage in interstitial lawmaking in ERISA cases in much the same way as the courts fashioned a federal common law of labor relations under section 301 of the LMRA."); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987) (recognizing a claim under general trust law principles for knowing participation in a fiduciary breach); *Plucinski v. I.A.M. Nat. Pension Fund*, 875 F.2d 1052, 1056 (3d Cir. 1989) ("Since Congress both authorized and expects that the courts will create a common law under ERISA, we need not look for a specific congressional intent to create the remedy at issue."); *Provident Life and Accident Insurance Co. v. Waller*, 906 F.2d 985, 993-94 (4th Cir.) (appropriate "to weave into the statutory fabric of ERISA the federal common law remedy of unjust enrichment"), *cert. denied*, 111 S. Ct. 512 (1990); *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 972-73 (5th Cir. 1981) ("The legis-

The court of appeals was on equally solid ground when it turned to the law of private trusts for guidance in determining whether federal common law should incorporate a right of contribution among ERISA fiduciaries. This Court has made it abundantly clear that trust law is the appropriate guidepost for resolving issues on which ERISA is silent.

> ERISA abounds with the language and terminology of trust law. * * * ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, * * * "codif[y] and make[] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." * * * Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." * * * In determining the appropriate standard of review for actions under § 1132(a)(1)(B), *we are guided by principles of trust law.*

Firestone Tire & Rubber, 489 U.S. at 110 (citations omitted; emphasis added). *See Central States, Southeast*

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lative history of ERISA indicates that this section was intended to create a federal common law concerning pension rights, which would augment the rights created by ERISA's substantive provisions."); *Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221, 236 (6th Cir.) (employer's claim for return of mistaken contributions arises under and is governed by federal common law), *cert. denied*, 479 U.S. 1007 (1986); *Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.) (*en banc*) ("When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits."), *cert. denied*, 111 S. Ct. 67 (1990); *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978) (relying on common law of trusts to uphold remedy of recision); *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11th Cir. 1986) (acknowledging power to fashion federal common law but refusing to adopt a rule estopping the enforcement of the plan's terms "because ERISA expressly addresses the issue"); *but see Nieto v. Ecker*, 845 F.2d 868, 872 (9th Cir. 1988) (rejecting argument "that the common law of trusts supplies a federal cause of action where the statute itself provides none.")

& Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985) ("* * * rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-334 (1981) (Congress intended that union welfare funds regulated by the Taft-Hartley Act be operated under traditional trust law principles, and this desire became explicit in ERISA).

Mindful of this, the court of appeals examined the treatment of contribution claims under private trust law and found overwhelming authority for the proposition that a trust fiduciary is entitled to seek contribution from a cofiduciary who shares responsibility for a loss sustained by the trust. As the court of appeals put it,

> We must next determine whether traditional trust law provides for a right of contribution among defaulting fiduciaries. Indisputably, it does. Chemung and Fairway do not seriously contend to the contrary, nor could they, because the right of contribution among co-trustees has been for over a century, and remains, an integral and universally-recognized part of trust doctrine. *See* Restatement (Second) of Trusts § 258 (1959); Bogert, *The Law of Trusts and Trustees*, § 701 (2d ed. rev. 1982) (citing *Perry v. Knott*, 4 Beav. 179 (1842); *Sherman v. Parish*, 53 N.Y. 483 (1873)).

A. 35.

The petitioners are now in no better position to argue that a right of contribution is antithetical to the trust law principles embodied in ERISA than they were in the court of appeals. The principle of contribution is central to the law of equity, and has been so since the development of the concept of equity by the Roman courts. J. Pomeroy and S. Symons, II *Equity Jurisprudence* §§ 405

and 406 (5th ed. 1941); Halsbury, 38 *The Laws of England* ¶ 1829 (3d ed. 1962). The petitioners have offered no persuasive reason for this Court to depart from this bedrock principle of equity; nor have they advanced any reason for believing that Congress would have preferred a different result under the law of employee benefit trusts.

II. THERE IS NO SUBSTANTIAL CONFLICT AMONG THE CIRCUITS. THE COURTS OF APPEALS WHICH HAVE REJECTED CONTRIBUTION CLAIMS HAVE DONE SO ONLY BECAUSE THERE IS NO IMPLIED RIGHT OF CONTRIBUTION UNDER ERISA.

The petitioners contend that the decision below conflicts with decisions in other circuits, principally *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989) and *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989). The petitioners are mistaken. These cases decided nothing more than that a right of contribution among ERISA fiduciaries is not a statutorily "implied right of action" under the principles enunciated in *Cort v. Ash*, 422 U.S. 66 (1975). As the decision below recognized, the Ninth Circuit correctly resolved the issue presented to it. A. 34. But to say that ERISA contains no implied right of action for contribution under the *Cort v. Ash* test plainly does not answer the question of whether there should be a federal common law right of contribution under ERISA.

As this Court has made clear in at least two decisions, the question of whether there is a statutorily implied right of action for contribution is entirely distinct from the question of whether the federal courts, properly exercising federal common law powers in appropriate circumstances, should adopt a right of contribution. *Northwest Airlines*, 451 U.S. at 86; *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 638 (1981). Here, the court of appeals agreed that there is no statutorily implied right of action for contribution, but recognized that it should formulate a right of contribution as a matter of federal

common law. This decision is entirely consistent with this Court's precedent, and it is not in conflict with the *Call* decision.

At issue here are two seemingly related but quite different doctrines. In *Cort v. Ash*, this Court distilled from its earlier decisions a four factor test for determining when, as a matter of statutory construction, it is appropriate for the courts to find a private cause of action implied in a particular statutory scheme. The Court held that it is appropriate to imply a cause of action only if it can be determined that the party seeking the remedy is a member of the class for whose benefit the legislation was enacted, that Congress intended to create such a cause of action, that the remedy is consistent with the legislative scheme, and that the remedy is not one traditionally relegated to state law. 422 U.S. at 78. More recently, this Court has confirmed that the factors identified in *Cort v. Ash* apply equally to questions of statutory interpretation under ERISA. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) ("Thus, the relevant text of ERISA, the structure of the entire statute, and its legislative history all support the conclusion that in § 409(a) Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages * * *.")[5]

The federal common law doctrine, in contrast, is available in only two limited situations: where the courts in

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[5] Throughout their briefs, the petitioners suggest that the decision here is inherently inconsistent with this Court's decision in *Russell*. However, it is evident that *Russell* was concerned only with the question of whether a cause of action should be implied under section 409(a) of ERISA. 473 U.S. at 138 n.5; *id.* at 149 ("This case presents a single, narrow question: whether the § 409 'appropriate relief' referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extra-contractual damages for breach of fiduciary duty.") (Brennan, J., concurring). Thus, unlike *Northwest Airlines* and *Texas Industries*, the Court was never presented with, and certainly did not reach, the question of federal common law.

the absence of legislation must "* * * fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States * * *," *Northwest Airlines*, 451 U.S. at 95; or under a few statutes where "* * * Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." *Texas Industries*, 451 U.S. at 642. As the Court's analyses in *Northwest Airlines* and *Texas Industries* make plain, the implied right of action and federal common law doctrines are "two quite different theories," *Northwest Airlines*, 451 U.S. at 86, and the outcome under one theory is not dispositive of the outcome under the other theory.

Despite this, the petitioners contend that the decision of the court of appeals conflicts with decisions in other circuits rejecting a right of contribution among ERISA fiduciaries. An examination of the cases that the petitioners rely on reveals that there is no substantial inter-circuit conflict.

The petitioners rely principally on two decisions of the Ninth Circuit, *Kim v. Fujikawa*, 871 F.2d 1427, and *Call v. Sumitomo Bank of California*, 881 F.2d 626. Both cases presented a single narow issue: whether section 409 of ERISA, 29 U.S.C. § 1109, can be interpreted to provide, by implication, a right of contribution among ERISA fiduciaries. In *Kim*, the court summarily rejected the claim, stating that

> * * * As the Supreme Court noted in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 141-42 (1984), section 409 of ERISA * * * only establishes remedies for the benefit of the *plan*. Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a *breaching fiduciary*. *See Call v. Sumitomo Bank*, 689 F. Supp. 1014, 1017-20 (N.D. Cal. 1988).

* * * *

> * * * we cannot agree with Fujikawa's contention that Congress implicitly intended to allow a cause of action for contribution under ERISA * * *.

Kim, 871 F.2d at 1432 (emphasis in original). Thus, as the petitioners appear to concede, Pet. at 6, *Kim* on its own plainly creates no conflict with the decision here. Indeed, the court of appeals has explicitly agreed that a right of contribution cannot be implied as a matter of statutory interpretation under the test set out in *Cort v. Ash*. A. 34.

The *Call* case likewise creates no conflict. Like *Kim*, the only issue presented on appeal in *Call* was whether there is a statutorily implied right of contribution under section 409(a) of ERISA.

> In their second cause of action, asserted by appellants in their capacity as fiduciaries, appellants sought contribution from all of the appellees in "an amount to be determined at the time of trial." *Appellants based this claim on ERISA § 409(a)*, 29 U.S.C. § 1109(a).

Call, 881 F.2d at 629 (emphasis added). The court of appeals rejected this argument explicitly on the ground that its earlier decision in *Kim* was a binding determination of the issue.

> * * * we are foreclosed from considering these arguments because they were rejected in our recent decision in *Kim* * * * In that case, we held that ERISA § 409, 29 U.S.C. § 1109, the provision upon which appellants in the instant case rely, "only establishes remedies for the benefit of the *plan*" and therefore "cannot be read as providing for an equitable remedy of contribution in favor of a *breaching* fiduciary."
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> * * * *
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> The *Kim* opinion is unambiguous and undistinguishable. Because *Kim* governs this case, we affirm the district court's dismissal of appellants' contribution claim.

Call, 881 F.2d at 630-31 (emphasis in original; citations and footnote omitted).

It is readily apparent that *Call* does not conflict with the decision here. The *Call* court held only that as a matter of statutory interpretation, section 409(a) of ERISA cannot be read to imply a cause of action for contribution, a holding with which the court of appeals below agreed. A. 34. The appellants in *Call* did not argue, and the court of appeals did not address the separate question of whether the courts should adopt a right of contribution as a matter of federal common law under ERISA. *Call*, 881 F.2d at 629; *see Call v. Sumitomo Bank of California*, 689 F. Supp. 1014, 1022 (N.D. Cal. 1988) ("* * * under *Northwest Airlines*, this Court may not imply a right of contribution into ERISA.").

Two other decisions cited by the petitioners require only brief discussion. In *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), the court of appeals for the Seventh Circuit declined to fashion as a matter of federal common law a cause of action against a non-fiduciary for assisting in a violation of ERISA's reporting and disclosure requirements, concluding that such a claim would be inconsistent with explicit statutory policies. As such, the decision does not conflict in any way with the decision below or with settled principles governing the limits of the courts' authority to develop federal common law under a particular statutory scheme. *See Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 323 (1990) (in formulating maritime rules, the court "must * * * keep strictly within the limits imposed by Congress"). *Cf. Fox Valley & Vicinity Const. Workers Pension Fund v. Brown*, 897 F.2d 275, 281 (7th Cir.) (*en banc*) ("When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits."), *cert. denied*, 111 S. Ct. 67 (1990).

In contrast, one district court in the Fourth Circuit has explicitly decided that it would not adopt a federal

common law of contribution among ERISA fiduciaries, reasoning that because Congress explicitly incorporated various principles of traditional trust law into the statute, it did not intend the courts to incorporate other trust principles as a matter of federal common law. *NARDA, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685, 695-98 (D. Md. 1990). However, one month before *NARDA*, in a decision not cited by the district court, the Fourth Circuit adopted a federal common law rule of unjust enrichment, reasoning that such a rule furthered the policies expressed in the statute. *Provident Life & Acc. Ins. Co. v. Waller*, 906 F.2d 985, 992-93 (4th Cir.), *cert. denied*, 111 S. Ct. 512 (1990). This lone trial court decision, which evidently does not reflect the law in the Fourth Circuit, does not present a substantial conflict that merits resolution by this Court.

III. RECOGNIZING A RIGHT OF CONTRIBUTION AMONG ERISA FIDUCIARIES IS CONSISTENT WITH THE STATUTE'S POLICY GOALS AND WILL SERVE TO FOSTER THE GROWTH AND DEVELOPMENT OF EMPLOYEE BENEFIT PLANS.

Contrary to petitioners' assertions, recognizing contribution among fiduciaries as a remedy under ERISA common law is entirely consistent with the statute's purpose. Congress enacted ERISA to "protect the interests of participants in employee benefit plans * * *," ERISA § 2(b), 29 U.S.C. § 1001(b), articulating minimum standards to "assur[e] the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a). Thus, ERISA establishes "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and * * * provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). In specifying who is a fiduciary subject to these standards, Congress reached beyond mere titles, defining "fiduciary" as any individual

or institution exercising discretion or control over the managemnet of a plan or its assets. ERISA § 3(21), 29 U.S.C. § 1002(21). Recognizing contribution among this broad class of fiduciaries under ERISA furthers the goal of protecting the interests of participants and beneficiaries.

The availability of contribution among fiduciaries, for example, increases the likelihood that parties are brought into the action with a sufficient pool of resources to provide a full recovery to participants and beneficiaries. This is particularly important where a claim is asserted against one fiduciary and the fiduciary is unable to satisfy a judgment, in whole or in part. The ability to assert a contribution claim could also have the effect of extending the limitations period by permitting one fiduciary to seek contribution against another fiduciary even after a participant's claim is barred. Thus, contribution would generally make it easier for participants and beneficiaries to recover for fiduciary breaches.

The potential for liability to other fiduciaries serves as a stronger deterrent to fiduciary breach than the more limited risk of liability only to the plan. Without contribution, a breaching fiduciary is at risk only until another fiduciary reimburses the plan for a breach. With the possibility of an action for contribution, however, a fiduciary's potential liability is not extinguished by the plan's recovery from another fiduciary. This increased risk of liability increases a fiduciary's incentive to comply with ERISA's fiduciary standards.

Petitioners' own example illustrates the salutary effect the potential for contribution could have on a plan fiduciary's behavior. Petitioners explain that small employers may lack the expertise to comply with ERISA's technical requirements. Pet. at 13. Putting themselves in that class of small employers, petitioners apparently sought, by hiring Dawson and then Sovran, to relieve themselves of the duty to comply with ERISA's technical require-

ments. Pet. at 13. The specter of contribution, according to petitioners, would have a chilling effect on small employers, discouraging them from establishing ERISA plans. Pet. at 14. However, even hiring professional plan managers does not relieve an employer like Fairway of ERISA's very basic, non-technical duty to monitor fiduciaries hired to perform specific functions. If the threat of liability arising from potential contribution claims would have caused Fairway to take a harder look at the investments made by Dawson or to share with Sovran any doubts about Dawson's performance, such an effect promotes the purposes of ERISA.

The greater expense and effort for ERISA plaintiffs that petitioners foresee as a result of contribution among fiduciaries is similarly not a persuasive reason to omit this remedy. Pet. at 15. Petitioners' argument fails to acknowledge the multitudes who are already subject to suit under ERISA's broad, functional definition of "fiduciary." ERISA 3(21), 29 U.S.C. § 1002(21). Because Congress defined "fiduciary" for purposes of ERISA very broadly, most ERISA plaintiffs already name more than one party in their fiduciary breach actions. The incremental expense and effort that could result from cross-claims and third party claims among fiduciaries would hardly deter a plaintiff.

Permitting claims for contribution will also help to ensure an adequate pool of qualified institutions and individuals willing to serve as fiduciaries, and equally important, willing to serve at a reasonable cost to the plan. Fiduciaries commit breaches for reasons ranging from negligence or ignorance to affirmative criminal intent. Regardless of the reason for a breach, ERISA makes all breaching fiduciaries strictly liable to the plan for losses stemming from the breach. If, however, fiduciaries are prohibited from allocating among themselves the cost of the breach in accordance with their culpability, some individuals and institutions will be reluctant to undertake the role of fiduciary.

At bottom, petitioners' policy arguments against contribution fail to recognize three fundamental propositions. First, Congress made it plain that it intended to confer on the courts the power to establish a federal common law of employee benefit plans. Congress made it equally plain that the common law of ERISA should find its source in traditional trust law. Finally, from the earliest days, traditional trust law incorporated concepts of contribution and indemnity among trust fiduciaries. It follows that there is no justification whatsoever for denying fiduciaries of employee benefit plans the right to seek contribution and indemnity from their co-fiduciaries. To rule otherwise serves no purpose except to insulate some fiduciaries from the consequences of their misconduct.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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